IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.973 OF 2005
IN
SUIT NO.954 OF 2005

Subash Dattatreya Kandalkar ...Plaintiff
V/s.
Shailendra Mohanlal Desai ...Defendant

Mr. N. Ardeshir, Advocate, i/b. Pandya Gandhi & Co., for Plaintiff.

Mr. P.M. Shah, Advocate, for Defendant.

CORAM : S.J. VAZIFDAR, J.
DATED : 22ND AUGUST, 2006

P.C. :

The suit is filed for specific performance of an agreement to sell a flat contained in a letter dated 2nd February, 2003 from the Defendant to the Plaintiff.

2. I will presume that all the essential terms and conditions necessary to constitute a contract are present in the letter.

3. The Plaintiff addressed a notice dated 07th May, 2004 i.e. 15 months after the agreement dated 02nd February, 2003 calling upon the Defendant to perform the agreement. The Defendant's Advocate by a letter dated 24th May, 2004 stated that the Plaintiff

had subsequently given another cheque of Rs.89,000/- dated 28th March, 2003 towards further part payment. The cheque was dishonoured for insufficiency of funds in the account.

4. According to the Defendant he thereafter contacted the Plaintiff who informed him that he was not in a position to pay the entire contract amount of Rs.11,00,000/- and that the letter dated 02nd February, 2003 should be treated as cancelled.

The Plaintiffs case as stated in a letter dated 16th June, 2004 is that the cheque was dishonoured as the Defendant had attempted to encash the same despite having failed to give a letter addressed to the Secretary of the Society for the purpose of effecting the transfer of the flat in his name, a copy of the agreement by which the Defendant purchased the flat and a copy of the share certificate of the Society. The Plaintiff also alleged that the Defendant was to address another letter to the Secretary of the Society regarding the Defendant’s intention to sell the flat and transfer the share certificate in the Plaintiff’s name and to obtain no objection letter from the Society in respect thereof.

5. Prima facie, it is clear that the Defendant's case is well founded. The agreement is contained in the letter dated 2nd February, 2004. The cheque was admittedly dishonoured on 28th March, 2003. There is nothing on record to even remotely suggest what transpired thereafter and upto 15th May, 2004 i.e. for 14 months. If the Plaintiff's case as alleged in the letter dated 16th June, 2004 was true surely he would have immediately addressed a letter to that effect in March / April, 2004 itself. He did not do so. There is no explanation whatsoever why he did not do so.

6. It appears that the Defendant's contention that the Plaintiff had abandoned the agreement is correct. There is no other explanation either from the surrounding circumstances or otherwise.

7. In the circumstances, the Notice of Motion is dismissed. The learned counsel appearing on behalf of the Defendant have agreed to refund the earnest money. The Plaintiff's Advocate refused the same.